ORIGINAL

STATE OF MICHIGAN

IN THE SUPREME COURT

ABDUL AL-SHIMMARI,

Plaintiff/Cross-Appellant,

Supreme Court No._____
COA: 262655
L.C. No.: 04-407162-NH

v.

SETTI RENGACHARY, M.D.,
THE DETROIT MEDICAL CENTER,
HARPER-HUTZEL HOSPITAL, and
UNIVERSITY NEUROSURGICAL
ASSOCIATES, P.C., Jointly and
Severally,

Defendants/Cross-Appellees.

130078

DEFENDANTS/CROSS-APPELLEES' ANSWER TO PLAINTIFF/CROSS-APPELLANT'S CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL

PROOF OF SERVICE

SAURBIER & SIEGAN, P.C.

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RELIEF SOUGHT

Plaintiff/Cross-Appellant has filed an Application for Leave to Appeal conditioned upon this Court's acceptance of Defendants/Cross-Appellees' Application for Leave to Appeal filed on December 12, 2005. While Plaintiff correctly notes that MCR 7.302(d)(2) allows a party to file "an application for leave to appeal as cross-appellant" within 28 days after Appellants' Application is filed, this Court Rule provides no authority to file a "conditional" application. Furthermore, Plaintiff has failed to set forth any appropriate grounds on which this Court should rely in considering whether to accept the Cross-Appellant's Application for Leave to Appeal. As required by MCR 7.302(b), an application to this Court must establish the grounds on which the Appellant relies in requesting review.

Even if we assume that the grounds on which Plaintiff applies to this Court is because the decision of the Court of Appeals, rendered on November 1, 2005, is "clearly erroneous and will cause material injustice," the Application should be denied. Essentially, the issues presented to this Court are what constitutes a general appearance under *Penny v ABA Pharmaceutical Co.*, 203 Mich App 178; 511 NW2d 896 (1993), and the appropriate application of the Doctrine of Equitable Estoppel, an issue the Court of Appeals refused to decide. Plaintiff is under the mistaken belief that the Court of Appeals is required to explain in its November 1, 2005 Opinion "what specific acts of Defendants-Appellants failed to satisfy the two-part test for an appearance stated in *Penny, supra.*" But, Plaintiff cites no case law to support this argument.

Accordingly, Defendants respectfully request that this Court decline to accept the Cross Application and grant leave.

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD DECLINE TO ACCEPT PLAINTIFF'S REQUESTED LEAVE TO CROSS-APPEAL TO CONSIDER WHETHER *PENNY V ABA PHARMACEUTICAL CO.* REQUIRED MORE THAN NEGOTIATIONS FOR AN EXTENSION OF TIME IN WHICH TO FILE RESPONSIVE PLEADINGS TO ADMIT EVIDENCE AND, THEREFORE, OPERATES AS A WAIVER OF ANY DEFECTS IN SERVICE OF PROCESS?

Defendants/Cross-Appellees say "**YES**."

Plaintiff/Cross-Appellant says "**no**."

II. WHETHER THIS COURT SHOULD DECLINE TO ACCEPT PLAINTIFF'S REQUESTED LEAVE TO CROSS-APPEAL TO CONSIDER WHETHER NEGOTIATIONS FOR AN EXTENSION OF TIME IN WHICH TO FILE RESPONSIVE PLEADINGS AND THE REQUIRED SIGNING OF A STIPULATION TO ADMIT EVIDENCE IS SUFFICIENT TO INVOKE THE DOCTRINE OF EQUITABLE ESTOPPEL AND BAR DEFENDANTS FROM OBJECTING TO SERVICE OF PROCESS?

Defendants/Cross-Appellees say "**YES**."

Plaintiff/Cross-Appellant says "**no**."

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. Factual Background

For purposes of brevity, the underlying lawsuit involves an alleged claim of medical malpractice against the Defendants. Plaintiff underwent surgery by Dr. Rengachary on September 17, 2001. Following surgery, Plaintiff reported improvement but, at some point, decided he was not doing well, and filed a lawsuit seeking money damages.

II. Procedural History – Court of Appeals

Since a complete rendition of the trial court proceeding is contained in Appellants' Application for Leave to Appeal, the same will not be repeated herein.

The Court of Appeals issued its unpublished Opinion on November 1, 2005, in Docket Nos. 259363, and 262655. The only portion of the Opinion that is being challenged by Plaintiff is found at footnote 3. That footnote provides:

> We noted that plaintiff argues that Rengachary waived his right to claim lack of service by failing to object before participating in the suit and that through his attorneys, he entered a general appearance in the trial court by negotiating for a filing extension and for a stipulation regarding evidence. Defendants' attorneys' actions were not sufficient to constitute a general appearance on Rengachary's behalf. A party may still waive his right to object to service if he submits to the court's jurisdiction by entering a general appearance and constituting a suit on the merits. *Penny v ABA Pharmaceutical Co.* (on remand), 203 Mich App 178, 181; 511 NW2d 896 (1993).

Slip Op, p 20.

Moreover, in respect to the application of equitable estoppel in issue two of Plaintiff's Cross-Appeal, the issue was raised for the first time in Plaintiff's Motion for Rehearing. The Court of Appeals declined to address this issue. This issues is improperly presented to this Court.

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ARGUMENTS

I.

THIS COURT SHOULD DECLINE TO ACCEPT PLAINTIFF'S REQUESTED LEAVE TO CROSS-APPEAL TO CONSIDER WHETHER *PENNY V ABA PHARMACEUTICAL CO.* REQUIRED MORE THAN NEGOTIATIONS FOR AN EXTENSION OF TIME IN WHICH TO FILE RESPONSIVE PLEADINGS TO ADMIT EVIDENCE AND, THEREFORE, OPERATES AS A WAIVER OF ANY DEFECTS IN SERVICE OF PROCESS.

Plaintiff argues that the Court of Appeals erred by failing to specify why the acts of defense counsel did not satisfy the two part test set forth in *Penny v ABA Pharmaceutical Co.*, 203 Mich App 178; 511 NW2d 896 (1993), and begs this Court to find that communications between counsel for the parties to negotiate an extension of time in which to file responsive pleadings, correspondence to confirm the extension, signing of a stipulation to admit medical records (that was required by Plaintiff's counsel in order to obtain the extension of time), establishes an "appearance," and operates as a waiver of any defects in the service of process under *Penny*, *supra*. The law does not support this argument.

The pivotal case on this issue (and relied on by the Court of Appeals) is *Penny v ABA Pharmaceutical Co.* But, the acts between defense counsel in the instant matter and those raised in *Penny* are distinguishable. The *Penny* plaintiff filed suit against a number of drug manufacturers, but was unable to serve Squibb & Sons, Inc. within the time set by court order. The Wayne County Circuit Court entered an order dismissing Squibb from the case for failure of service. Plaintiff did not become aware of the dismissal until many months later. After learning of the dismissal, plaintiff filed a second lawsuit against Squibb, but since the Statute of Limitations had expired, the lawsuit was dismissed. *Id.* at 180-81. In late 1989, the trial court granted summary disposition in favor of all defendants. On appeal, plaintiff argued that Squibb

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had submitted itself to the court's jurisdiction by appearing in the matter and thereby waived any defense based on lack of service of process. *Id.* at 181.

The court agreed and found that Squibb had knowledge of the pending proceedings and an intention to appear in the matter. Squibb's attorney was appointed to the steering committee to facilitate all defendants' defenses and for ease of communication. Additionally, Squibb's attorney was also present and participated in specifically allocated motion days set by the trial court. *Id.* at 183. Moreover, Squibb's counsel sent a letter to plaintiff's counsel, referencing the matter and indicating that a true copy of the court's order granting a motion for extension of time within which to answer interrogatories was enclosed. Further, Squibb's counsel misled plaintiff into believing that it had been properly served and had not been dismissed from the case. *Id.* Accordingly, the court found that Squibb's attorneys had acted in a manner consistent with "actively defending this lawsuit." *Id.*

After comparing the acts in *Penny* with the acts by defense counsel herein, the Court of Appeals ruled that Defendants' acts "were not sufficient to constitute a general appearance on Rengachary's behalf." Slip Op, p 20. Moreover, Rengachary was required to challenge the expiration of the Statute of Limitations prior to service of the Complaint in his first responsive pleading, which he did.

In further support of his claim that Defendants were precluded from challenging service of process, Plaintiff cites to *National Coal Company v Cincinnati Gas, Coke, Coal & Mining Co.*, 168 Mich 195; 131 NW 580 (1911), *In re Slis*, 144 Mich App 678; 375 NW2d 788 (1985), and *Ragnone v Wirsing,* 141 Mich App 263; 367 NW2d 369 (1984).

The *National Coal Company* court ruled that the acts of a non-resident corporation waived its right to challenge jurisdiction because the non-resident corporation filed a notice that a

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specific firm had been retained as its attorneys in the case, and consented to a stipulation extending time in which to plead. At the time that this case was decided in 1911, apparently there was no Statute for service of process upon a foreign corporation in an action brought by a non-resident of this State where the cause of action accrued in Canada. Accordingly, defendants argued that without such a Statute, service upon defendants' president conferred no jurisdiction over the defendant. *Id.* at 197. This Court stated that:

> The notice of retainer filed and served was general in nature, no limitation appearing in it. . . the objection of extension of time is consistent only with a general appearance.

National Coal Company at 197.

This case is also distinguishable from the instant matter for two reasons. First, defense counsel never filed an appearance indicating that Saurbier & Siegan would be the attorneys of record for the Defendants. Instead, defense counsel filed, as its first responsive pleading, a Motion for Summary Disposition challenging the service of process on Dr. Rengachary within the Statute of Limitations. Secondly, unlike *National Coal*, the first document filed by Dr. Rengachary was a Motion challenging service of process/Statute of Limitations issue.

Next, *In re Slis*, 144 Mich App 678 is easily distinguished from the instant matter. Defendant appeared in juvenile court and signed a waiver of service form, four days prior to the trial date. Additionally, the Court clearly stated that defendant was "being advised in court that the next hearing would be on June 21, and that such was adequate notice." *Id.* at 682. Mrs. Slis had actually appeared in court.

Lastly, in *Ragnone,* the defense attorney communicated with plaintiff for the purpose of negotiating a settlement, wrote a letter seeking an extension of time for filing an *answer*, and even attended a scheduled meeting. *Id.* at 265-66. Likewise, in *Slis,* a termination of parental

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rights case, the mother voluntarily appeared in court and signed a waiver concerning notice of the hearing. The instant matter is vastly different. First, Appellant's argument that the signature block for Scott Saurbier indicating "Attorneys for Defendants" establishes an intent to defend is presumptuous at best. Dr. Rengachary was not the only Defendant in the underlying case. Mr. Saurbier and Mr. O'Neill were also counsel for Defendants, the Detroit Medical Center, Harper Hospital and University Neurosurgical Associates. Second, Dr. Rengachary filed his own Motion for Summary Disposition in which he raised the Statute of Limitations defense. Dr. Rengachary's counsel was required to defend the lawsuit on behalf of the other Defendants.

Additionally, Plaintiff tries to stretch the meaning of "appearance" by also implying that communications during the Notice of Intent period is an intent by defense counsel to fight the case on the merits. This would completely eviscerate the Legislature's intent behind the enactment of the NOI Statute – to encourage settlement discussions. However, it is clear that 6 CJS2d, Appearances, § 19, requires something more than communication between counsel. That section provides:

> Broadly stated, any action on the part of defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance. So where defendant takes any step which the court would have no power to dispose of without jurisdiction of his person he submits to the jurisdiction of the court. . . .
>
> On the other hand, although an act of defendant may have some relation to the cause, it does not constitute a general appearance, if it in no way recognizes that the cause is properly pending or that the court has jurisdiction, and no affirmative action is sought from the court.

Id. at pp 24-25. Defendants sought no action from the court.

Also, in *Rhodes v Rhodes,* 3 Mich App 396; 142 NW2d 503 (1966), again, it is clear that greater acts than those were undertaken by defense counsel in the instant matter to establish a general appearance. The *Rhodes* defendant signed an acceptance of service and a property

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settlement and custody agreement that was filed with the court. *Id.* at 398-99. The Court of Appeals declined to find that signing a property settlement and custody agreement constitutes a general appearance[1]. *Rhodes* at 401. Accordingly, the Court of Appeals correctly held that negotiations to obtain an extension of time to file responsive pleadings and signing a stipulation presented (and required) by plaintiff's counsel was insufficient to establish an appearance, thereby waiving any challenge to the Statute of Limitations and service of process.

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[1] Although not authoritative, the court in *Dauphin v Landrigan,* 187 Wis 633, 636; 205 NW 557 (1925), ruled that the making of a stipulation did not constitute an appearance.

II.

THIS COURT SHOULD DECLINE TO ACCEPT PLAINTIFF'S REQUESTED LEAVE TO CROSS-APPEAL TO CONSIDER WHETHER NEGOTIATIONS FOR AN EXTENSION OF TIME IN WHICH TO FILE RESPONSIVE PLEADINGS AND THE REQUIRED SIGNING OF A STIPULATION TO ADMIT EVIDENCE IS SUFFICIENT TO INVOKE THE DOCTRINE OF EQUITABLE ESTOPPEL AND BAR DEFENDANTS FROM OBJECTING TO SERVICE OF PROCESS.

Here, there is nothing for this Court to review – neither the trial court nor the Court of Appeals rendered a ruling that defense counsel intentionally or negligently induced Plaintiff to rely on a fact that was untruthful. Plaintiff stretches the Doctrine of Equitable Estoppel in attempting to invoke its principals where defense counsel merely negotiates for the extension of time in which to file responsive pleadings and signs a stipulation to admit evidence, as demanded by Plaintiff's counsel. Plaintiff wishes to impress upon this Court that this situation is the same type of "inducement" presented in *Penny, supra.* Contrary to Plaintiff's claim, failing to tell Plaintiff's counsel about a potential affirmative defense is not an inducement as established by *Penny, supra.* In *Penny*, defendant Squibb's counsel obtained an order of dismissal from the case, but failed to provide a copy of the order to plaintiff's counsel. *Id.* at 183. Further, even though Squibb had an order dismissing it from the case, Squibb's counsel continued to participate in the case by acting as lead counsel for all defendants, appearing at motions, and heading the steering committee. *Id.* The court found that if plaintiff was aware of the dismissal, she could have taken appropriate action. *Id.* at 186. Accordingly, equitable estoppel was invoked to prevent Squibb from raising the defense of lack of service of process in the subsequent lawsuit. *Id.*

Plaintiff's claim that defense counsel failed to mention in telephone conversations any problems with service and, therefore, such attorney was induced to believe that defense counsel

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would defend the case on the merits and not raise this affirmative defense. There is no Court Rule that requires a defense attorney to inform Plaintiff's counsel about defective service. Attorneys all over the State have for many years, and will continue to negotiate with a Plaintiff's attorney, the extension of time in which to file responsive pleadings. This is the practice of law. Accordingly, if this Court decides to review this issue, the Court should not allow Plaintiff to stretch the *Penny* case beyond its bounds. Such a strain will disrupt the practice of law.

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CONCLUSION

Based on the foregoing, Defendants respectfully request that this Honorable Court deny Plaintiff's Application to Cross-Appeal because he failed to establish the requisite showing that the Court of Appeals was erroneous in its ruling on the appearance issue, or it failed to decide the issue of equitable estoppel.

Respectfully submitted,

SAURBIER & SIEGAN, P.C.

BY: 

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DATED: January 27, 2006

SAURBIER & SIEGAN, P.C., SUITE 402, 400 MAPLE PARK BOULEVARD, ST. CLAIR SHORES, MICHIGAN 48081 (586) 447-3700

STATE OF MICHIGAN
IN THE SUPREME COURT

ABDUL AL-SHIMMARI,

Plaintiff/Cross-Appellant,

Supreme Court No._____
COA: 262655
L.C. No.: 04-407162-NH

v.

SETTI RENGACHARY, M.D.,
THE DETROIT MEDICAL CENTER,
HARPER-HUTZEL HOSPITAL, and
UNIVERSITY NEUROSURGICAL
ASSOCIATES, P.C., Jointly and
Severally,

Defendants/Cross-Appellees.

AMENDED PROOF OF SERVICE

TRACY KEMPF, being first duly sworn, deposes and says that she is an employee of the firm of SAURBIER & SIEGAN, P.C., and that on the 27th day of January, 2006 she caused to be served a copy of the **Defendants/Cross-Appellees' Answer to Plaintiff/Cross-Appellant's Conditional Application for Leave to Appeal and Proof of Service** upon the following:

Law Office of Andre M. Sokolowski, P.C.
ANDRE M. SOKOLOWSKI (P60737)
Law Office of Michael S. Daoudi, P.C.
MICHAEL S. DAOUDI (P53261)
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26711 Northwestern Highway, Suite 200
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MATTHEW L. TURNER (P48706)
TURNER & TURNER, P.C.
Co-Counsel for Plaintiff/Cross-Appellant
26000 West 12 Mile Road
Southfield, MI 48034

by enclosing same in a pre-addressed, pre-stamped envelope and depositing same in the United States Mail.

TRACY KEMPF

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January 27, 2006

Hand Delivery
VIA UPS NEXT DAY AIR

Clerk of the Court
Michigan Supreme Court
925 W. Ottawa
Lansing, MI 48915

Re: **AL-SHIMMARI, Abdul v. Harper Hospital, The Detroit Medical Center, Dr. Setti Rengachary and University Neurosurgical Associates, P.C.**
Lower Case No. 04-407162-NH
COA No.: 259363
Our File No.: 06.01190

Dear Sir/Madam:

Enclosed please find the original and eight (8) copies of Defendants/Cross-Appellees' Answer to Plaintiff/Cross-Appellant's Conditional Application for Leave to Appeal and Proof of Service for filing relative to the above-captioned matter. Please file same in your usual manner.

Please return a time-stamped copy in the enclosed envelope. Thank you for your attention to this matter.

Very truly yours,

SAURBIER & SIEGAN, P.C.

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taylord@saurbier.com

SAS/DKT/tek 162285
Enclosure
cc: Michael Dauodi, Esq./Andre Sokolowski, Esq.
Matthew Turner, Esq.

STATE OF MICHIGAN

IN THE SUPREME COURT

ORIGINAL

ABDUL AL-SHIMMARI,

Plaintiff/Cross-Appellant,

vs.

SETT S. RENGACHARY, M.D., THE DETROIT MEDICAL CENTER, HARPER-HUTZEL HOSPITAL, and UNIVERSITY NEUROSURGICAL ASSOCIATES, P.C.,

Defendants/Cross-Appellees.

Supreme Court No. _____

Court of Appeals No. 262655

Lower Court No. 04-407162-NH

ORIGINAL

_____/

130078

PLAINTIFF-CROSS-APPELLANT'S REPLY TO DEFENDANTS/CROSS-APPELLEES' ANSWER TO PLAINTIFF-APPELLEE'S CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL, and

CERTIFICATE OF SERVICE

By:

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-RELIEF SOUGHT-
IN SUPPORT OF PLAINTIFF/CROSS-APPELLANT'S REPLY

Plaintiff/Cross-Appellant, ABDUL AL-SHIMMARI, seeks leave to appeal from the Michigan Court of Appeals' November 1, 2005 Opinion on the condition of whether this Honorable Court denies or grants the Defendants-Appellants' application and, if granted, to grant leave to Plaintiff-Appellee's application to cross-appeal. **(Please see, exhibit 1, Plaintiff-Appellee's Application to Cross-Appeal)**. Grounds for this Honorable Court to grant leave to Plaintiff-Appellee's application to cross-appeal is asserted in the section entitled, "Standard of Review" of the Plaintiff-Appellee's application to cross-appeal.

In respect to its ruling, the Court of Appeals clearly erred for two reasons: 1) by failing to specifically explain in its November 1, 2005 Opinion, what specific acts of Defendants/Cross-Appellees failed to satisfy the two-part test for an appearance stated in Penny v. ABA Pharmaceutical Company, 203 Mich App 178, 511 NW2d 896 (1993); and 2) this matter clearly provides ample evidence and proof in support of finding an appearance was made on behalf of all Defendants/Cross-Appellees the instant their authorized Saurbier & Siegan, P.C., attorney began negotiations for a filing extension which was agreed to by Plaintiff/Cross-Appellant's counsel upon obtaining a singed Stipulation To Admit Into Evidence All Medical Records Of Abdul Al-Shimmari, specifically signed for "on behalf of all Defendants" (**EXHIBIT 1**), and to rule otherwise is material injustice.

Moreover, Plaintiff/Cross-Appellant would direct this Honorable Court's attention to the language of the Order itself, where it states, "Plaintiff's Counsel has contacted and spoken with Counsel for the Defendants SETTI S. RENGACHARY, M.D., THE DETROIT MEDICAL CENTER, HARPER-HUTZEL HOSPITAL, and UNIVERSITY

NEUROSURGICAL ASSOCIATES, P.C., with this information and both hereby stipulate and agree to the above request in the above referenced matter." (EXHIBIT 1) There is no more clearer evidence of fact that on April 6, 2004, the moment that stipulation was signed by Defendants/Cross-Appellees attorney, Bart P. O'Neill, of the law firm, Saurbier & Siegan, P.C., the Defendants/Cross-Appellees appeared as a matter of law, all of which transpired prior to any filling with the trial court by any Defendant/Cross-Appellee.

Plaintiff/Cross-Appellant requests that this Honorable Court grant this cross-application to consider the question of whether a party who enters a general appearance, without previous objections to the process or return, operates as a waiver of any defects in the process, including the service or return of the process, and a stipulation entered into between the parties or their counsel with reference to a pending action will be regarded as a general appearance.

Due to the Michigan Court of Appeals declining to address the issues of equitable estoppel and whether the return of service was inaccurate because of their dispositive decision that the trial court erred in granting the motion for summary disposition, in their November 1, 2005 Opinion, Plaintiff/Cross-Appellant brings this issue forward. This Honorable Court should grant leave to cross-appeal to consider the question of whether the doctrine of equitable estoppel bars a defendant from arguing objections to service of process, when that defendant intentionally or negligently induces the plaintiff to believe the defendant is fighting the instant proceeding on its merits. Otherwise, Plaintiff/Cross-Appellant will be prejudiced by not being able to bring to this Honorable Court all applicable issues raised in the Court of Appeals, and Defendants/Cross-Appellees would gain a windfall by appealing to the Michigan Supreme Court.

Upon granting leave to Plaintiff-Appellee's application to cross-appeal, Plaintiff/Cross-Appellant requests that this Honorable Court reverse the holding of the circuit court granting

Defendants/Cross-Appellees' Motions for Summary Disposition for the reasons stated in this cross-appeal.

-STATEMENT OF QUESTIONS PRESENTED-
IN SUPPORT OF PLAINTIFF/CROSS-APPELLANT'S REPLY

SHOULD THIS COURT GRANT LEAVE TO CROSS-APPEAL TO CONSIDER THE QUESTION OF WHETHER A PARTY WHO ENTERS A GENERAL APPEARANCE, WITHOUT PREVIOUS OBJECTIONS TO THE PROCESS OR RETURN, OPERATES AS A WAIVER OF ANY DEFECTS IN THE PROCESS, INCLUDING THE SERVICE OR RETURN OF THE PROCESS, AND A STIPULATION ENTERED INTO BETWEEN THE PARTIES OR THEIR COUNSEL WITH REFERENCE TO A PENDING ACTION WILL BE REGARDED AS A GENERAL APPEARANCE?

Plaintiff/Cross-Appellant says **"YES."**

Defendants/Cross-Appellees say "no"

SHOULD THIS COURT GRANT LEAVE TO CROSS-APPEAL TO CONSIDER THE QUESTION OF WHETHER THE DOCTRINE OF EQUITABLE ESTOPPEL BARS A DEFENDANT FROM ARGUING OBJECTIONS TO SERVICE OF PROCESS, WHEN THAT DEFENDANT INTENTIONALLY OR NEGLIGENTLY INDUCES THE PLAINTIFF TO BELIEVE THE DEFENDANT IS FIGHTING THE INSTANT PROCEEDING ON ITS MERITS?

Plaintiff-Appellee says **"YES."**

Defendants-Appellants say "no."

-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS- IN SUPPORT OF PLAINTIFF/CROSS-APPELLANT'S REPLY

(1) Plaintiff/Cross-Appellant relies on "Statement of Material Facts and Proceedings" submitted with PLAINTIFF-APPELLEE'S brief in opposition to Defendants-Appellant's application for leave to appeal.

Briefly in addition, the underlying lawsuit is a result of medical malpractice and principal/agency liability. Defendant, Dr. Setti S. Rengachary, for the very first time met Plaintiff, Abdul Al-Shimmari, on June 22, 2001. On that same day, Defendant, Dr. Setti S. Rengachary, became the very first health professional, in contradiction of over two years of medical opinion, treatment, and care, by numerous health professionals, including but not limited to specialists in lumbar spinal diseases, proposed major and extensive surgery consisting of a lumbar laminectomy, disectomy, fusion and pedicle screw stabilization at L4-L5.

On September 17, 2001, Defendant, Dr. Setti S. Rengachary, took Plaintiff to surgery with a pre-operative diagnosis and post-operative diagnoses of L4-L5 disc herniation on the right and performed a lumbar laminectomy, facetectomy and disectomy at L4-L5 on the right, posterior lumbar fusion, pedicle screw stabilization and structural allograft. Pedicle screws were inserted at L4-L5, but only on the right side with a connecting rod.

On October 5, 2001, at a follow up evaluation by Defendant, Dr. Setti S. Rengachary, Plaintiff came in with a walker, complained of significant right leg pain, informed Defendant, Dr. Setti S. Rengachary, that he had made several Emergency Room visits because of lack of pain control from the surgery and was prescribed Vicodin ES, was given a walking cane and placed on Dilaudid.

On October 19, 2001, Defendant, Dr. Setti S. Rengachary, again saw the Plaintiff, and indicated that Plaintiff had sensory loss from L1 to L5.

On November 30, 2001, Defendant, Dr. Setti S. Rengachary, indicated, amongst other complaints, that Plaintiff has noticed of wasting in the right thigh and leg.

On December 21, 2001, Defendant, Dr. Setti S. Rengachary, noted that his primary concern was Plaintiff's atrophy of the quadriceps on his right side.

Presently, Plaintiff who is permanently injured due to nerve injuries caused by the medical malpractice lives a life of ingesting prescribed pain killing medication so that he can barely function at the most minimal of levels. He is less than half the man he was before Defendant, Dr. Setti S. Rengachary, operated on him.

-ARGUMENT-
IN SUPPORT OF PLAINTIFF/CROSS-APPELLANT'S REPLY

I. This Court Should Grant Leave To Cross-Appeal To Consider The Question Of Whether A Party Who Enters A General Appearance, Without Previous Objections To The Process Or Return, Operates As A Waiver Of Any Defects In The Process, Including The Service Or Return Of The Process, And A Stipulation Entered Into Between The Parties Or Their Counsel With Reference To A Pending Action Will Be Regarded As A General Appearance.

For purposes of brevity, Plaintiff/Cross-Appellant will only reply to assertions raised in the Defendants/Cross-Appellees' Answer to Plaintiff/Cross-Appellant's Conditional Application for Leave to Cross-Appeal.

In Defendants/Cross-Appellees first attempt to apply law to the facts of this case, please direct your attention to page (3) three of the Defendants/Cross-Appellees' Answer to Plaintiff/Cross-Appellant's Conditional Application for Leave to Cross-Appeal (a.k.a. "Defendants/Cross-Appellees' Answer to Cross-Appeal"). Defendants/Cross-Appellees claim that the Court of Appeals compared the acts in *Penny v. ABA Pharmaceutical Company, 203 Mich App 178, 511 N.W. 2d 896 (1993)* with the acts of Defendants/Cross-Appellees attorneys. Where is this comparison in the November 1, 2005 Opinion issued by the Court of Appeals? *Penny's*, two (2) part test requires a factual comparison to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear. Simply, the Court of Appeals did not conduct the appropriate analysis to arrive at their decision or in the alternative, their decision is clearly erroneous.

Plaintiff/Cross-Appellant directs this Honorable Court's attention to the Order itself, **(EXHIBIT 1)**, where it states, **"Plaintiff's Counsel has contacted and spoken with Counsel for the Defendants SETTI S. RENGACHARY, M.D., THE DETROIT MEDICAL CENTER, HARPER-HUTZEL HOSPITAL, and UNIVERSITY NEUROSURGICAL ASSOCIATES, P.C., with this information and both hereby stipulate and agree to the**

above request in the above referenced matter." (EXHIBIT 1) There is no more clearer evidence of fact that on April 6, 2004, before any filling with the trial court by any Defendant/Cross-Appellee, the stipulation was signed by Defendants/Cross-Appellees attorney, Bart P. O'Neill, of the law firm, Saurbier & Siegan, P.C., making the Defendants/Cross-Appellees appear as a matter of law. The Defendants/Cross-Appellees attorneys were thoroughly familiar with the case and had the authority necessary to fully act on the Defendants/Cross-Appellees behalves.

Also on page (3) three of Defendants/Cross-Appellees' Answer, they assert that Defendant/Cross-Appellee, Dr. Setti S. Rengachary, was required to challenge the expiration of the Statute of Limitations in his first responsive pleading. Plaintiff/Cross-Appellant will not comment or suggest how Defendants/Cross-Appellees attorneys should practice law in the State of Michigan. Defendants/Cross-Appellees sought relief by Plaintiff/Cross-Appellant to extend the time to file their Answer without penalty or sanction. The relief was bargained for, and granted by the Plaintiff/Cross-Appellant so long as, "...Counsel for the Defendants SETTI S. RENGACHARY, M.D., THE DETROIT MEDICAL CENTER, HARPER-HUTZEL HOSPITAL, and UNIVERSITY NEUROSURGICAL ASSOCIATES, P.C.,..." stipulated to an Order of the Trial Court, which they did on April 6, 2004. **(EXHIBIT 1)** That Order, signed by Judge Edward Thomas, recognizes the stipulation by all parties and states:

> Upon stipulation of the parties, and the Court being fully advised in the premises;
>
> IT IS HEREBY ORDERED that any and all medical records of Abdul Al-Shimmari are deemed admitted into evidence for the reasons stated in the above stipulation.
>
> IT IS SO ORDERED.

In compliance with MCR 2.117, this act cannot be considered anything less than an act indicating that attorney, Bart P. O'Neill, of the law firm, Saurbier & Siegan, P.C., represented,

"...Defendants SETTI S. RENGACHARY, M.D., THE DETROIT MEDICAL CENTER, HARPER-HUTZEL HOSPITAL, and UNIVERSITY NEUROSURGICAL ASSOCIATES, P.C.,..." (EXHIBIT 1) in the action, thereby making an appearance on behalf of all Defendants/Cross-Appellees on April 6, 2004.

For Defendants/Cross-Appellees second attempt to apply law to the facts of this case, please direct your attention to page (4) four of the Defendants/Cross-Appellees' Answer. Defendants/Cross-Appellees assert they never filed an appearance and their first document filed was a Motion challenging service of process. Notwithstanding, Plaintiff/Cross-Appellant above arguments and his arguments made in the Plaintiff-Appellee's application to cross-appeal, an appearance can be made without filing a specific document entitled "Appearance." **In fact, the Defendants/Cross-Appellees NEVER DO FILE AN "Appearance."** Secondly, timing is important in this case because on April 16, 2004, the Defendants/Cross-Appellees file their first responsive pleading and Motion challenging service. However, on April 6, 2004, they stipulate to the Order described above and known as **(EXHIBIT 1).**

For Defendants/Cross-Appellees third attempt to apply law to the facts of this case, please direct your attention to page (5) five of the Defendants/Cross-Appellees' Answer. ***Defendants/Cross-Appellees try to draw this Honorable Court's attention AWAY from the words in the body of the Stipulation and Order itself*** and limit the review of the proofs and record to the "signature block for Scott Saurbier." Plaintiff/Cross-Appellant knows that once this Honorable Court reads **EXHIBIT 1** that this Court will realize that the Defendants/Cross-Appellees are trying once again to ruthlessly manipulate and distort the merits, truth, and facts of this case by any means necessary.

For Defendants/Cross-Appellees fourth attempt to apply law to the facts of this case, please direct your attention to page (5) five of the Defendants/Cross-Appellees' Answer.

Defendants/Cross-Appellees cite 6 CJS2d, Appearances, §19, trying to assert that what was conducted between the attorneys on behalf of all parties to this action prior to Defendants/Cross-Appellees untimely filing of their responsive pleadings on April 16, 2004, should only be considered mere communication or less. The Defendants/Cross-Appellees also state, ***"Defendants sought no action from the court."***

To assert this argument based on the facts, evidence, and record in this case is utterly absurd! Applying 6 CJS2d, Appearances, §19, Defendants/Cross-Appellees attorneys signed a stipulation *"...To Admit Into Evidence All Medical Records of Abdul Al-Shimmari"* which is attached to an order for signature by the trial court judge, Edward M. Thomas. This was done days before any act or communication by the Defendants/Cross-Appellees objecting to the jurisdiction over Dr. Setti S. Rengachary. Based on the record before this Honorable Court, Plaintiff/Cross-Appellant is utterly shocked that the Defendants/Cross-Appellees are asserting this argument to the Michigan Supreme Court! Your Honor's, please look at **EXHIBIT 1** and the fact that this document was not stipulated to over mere communications.

Before the Order attached as **EXHIBIT 1** was signed and stipulated too, Defendants/Cross-Appellees started with knowledge of this lawsuit upon receiving a Notice of Intent on September 16, 2003. Next, Scott A. Saurbier of Saurbier & Siegan, P.C., through a correspondence dated November 10, 2003 confirmed that they were the authorized Counsel to represent all Defendants-Appellants. **(Please see, exhibit 3, Plaintiff-Appellee's Application to Cross-Appeal)** Upon being personally served with a summons, complaint, and demand for jury trial, **voluntary actions on behalf of all Defendants/Cross-Appellees** was demonstrated when their authorized representative from Saurbier & Siegan, P.C. initiated contact with Plaintiff-Appellee's Counsel requesting a filing extension from April 1, 2004 to April 15, 2004. After a comprehensively bargained for consideration, analogous to a contract between two parties, **NOT**

TO BE CONSIDERED MERE COMMUNICATION, Counsel for all Defendants-Appellants carefully signed and entered into a stipulation purposely and specifically affecting all Defendants-Appellants. **(EXHIBIT 1)** This stipulation is "...To Admit Into Evidence All Medical Records of Abdul Al-Shimmari", which includes all named Defendants in the Complaint.

Furthermore, it is well established factually, that at no point prior to the stipulation of **EXHIBIT 1** being signed on April 6, 2004, did any Defendant-Appellant object or utter in any method of communication known to man that the service of process or return was at question, and now, as we are before the Honorable Michigan Supreme Court, no Defendant-Appellant can prove, say, or even suggest otherwise!

In compliance with 6 CJS2d, Appearances, §19, *Penny, supra,* and MCR 2.117, Defendants/Cross-Appellees acts prior to April 16, 2004, do in fact recognize that the cause of action is properly pending, that the Wayne County Circuit 3rd Circuit Court has jurisdiction, and that a signed stipulation on behalf of all parties required the affirmative action of the court to make it an Order of the Court. **(EXHIBIT 1)**

CONCLUSION & RELIEF REQUESTED

WHEREFORE, Plaintiff/Cross-Appellant relies on what is stated in Plaintiff/Cross-Appellant conditional application to cross-appeal.

Respectfully submitted,

Dated: February 17, 2006

ANDRE M. SOKOLOWSKI (P-60737)

Dated: February 17, 2006

MICHAEL S. DAOUDI (P-53261)